MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 11, 1999 at 9:00 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: HB 203, HB 204, HB 209, HB 492, 3/8/1999
Executive Action: HB 371, HB 492

HEARING ON HB 492

Sponsor: **REP. HAL HARPER, HD 52, Helena**

Proponents: **Herb Goodwin, First Special Services Forces Association**
Joe Upshaw, Civilian Aide to the Secretary of the Army, Veteran of Montana's 163rd Infantry

Regiment
Hal Manson, American Legion of Montana
Rick Salyer, Vietnam Veterans of America and Disabled American Veterans
Mike Hankins, Korean Veteran, The Marine Corp League, and The Chosen Few
Daniel Cochrane, U.S. Navy Veteran - USS Hancock
Roy C. Wahl, Montana 163rd Infantry Regiment
Robert Perry, Marine Corp League, Disabled American Veterans, Vietnam Veterans of America, and the VFW
Mike McCabe, Department of Military Affairs

Opponents: **None**

Opening Statement by Sponsor:

REP. HAL HARPER, HD 52, Helena, introduced HB 492 which adds places of worship, cemeteries and public memorials to the statute that prohibits desecration of the capitol. In 1995, a law was enacted that prohibited defacing the capitol or any of its permanent monuments. The crime of desecration includes placing or attaching any mark, design or material, not properly a part of the capitol, as well as injuring, damaging, or destroying any part of it. This bill extends this law to places of worship, cemeteries, and public memorials and protects them with the same penalties that are applied to desecration of the capitol.

The House modified this bill to state that if the amount of damage does not exceed $1,000, the imprisonment can be up to six months and the fine not to exceed $500. There seems to be a $500 gap. This bill comes at the request of **Marie Durkee** and **Herb Goodwin.**

{Tape : 1; Side : A; Approx. Time Counter : 9.10}

Proponents' Testimony:

Herb Goodwin, First Special Services Forces Association, remarked that there is a beautiful monument in Memorial Park. The vandalism started many years ago. The flags have been stolen from the flagpoles on many occasions. A series of spikes were placed around the poles to stop this activity. There is a large plague on the front of the monument, which required constant repair from vandalism. They have spent approximately $5,000 in the last few years on repairs.

Joe Upshaw, Civilian Aide to the Secretary of the Army, Veteran of Montana's 163rd Infantry Regiment, remarked that as a civilian aide he is charged with the responsibility of ensuring that all memorials, edifices, and structures situation in various communities of the United States are properly maintained, protected and accorded the same respect and reference that one would expect at the tomb of the Unknown Soldier. He speaks to the many young men who unselfishly gave their lives for their country. They have tried to obtain assistance from the local authorities in stopping the desecration at the monument at Memorial Park. The mayor and city council have been uncooperative and antagonistic. They are in the process of building a skateboard complex within the confines of the Memorial Park in Helena that has been clearly defined as a Veteran's Memorial Park.

Hal Manson, American Legion of Montana, related that they are concerned about the desecration of the memorials as well as the veteran's plots in cemeteries throughout the state. Headstones are broken or turned over and the graves are desecrated. The memorial in Memorial Park has been vandalized frequently in the past few years. There are names of individuals killed in World War II and the Korean War on this monument with whom he grew up. He would like to see their monument kept clean and neat. Those who vandalize the monument should pay a high price for their actions so that they will think before they act.

Rick Salyer, Vietnam Veterans of America and Disabled American Veterans, related that he has two pins which represent his two brothers who are still living and served in Vietnam. He has a pin from his father who served in Vietnam, Korea, and World War II. His pin identifies himself as a Vietnam Veteran. He is missing the pin of his brother who died as KIA and is listed on the wall in Missoula. A memorial is a matter of respect. It doesn't matter if it is the State Police Memorial on the Capitol grounds or if it is a memorial that some little girl created for her cat. We need to support this legislation and make sure that it is enforced.

Mike Hankins, Korean Veteran, The Marine Corp League, and The Chosen Few, remarked that the City Council of Helena has unanimously agreed that the skateboards may build their park within spitting distance of this very sacred memorial of the First Special Forces. The possibility for damage is very real. This bill will allow for penalties for those young people who fail to recognize the sacred aspects of the First Special Forces Memorial. They need law enforcement and legislation that will enable this community to provide severe penalties for the desecration of that memorial and the hope that over time the

young people will tend to see the memorial for what it is, a living testimony to the gallantry of many good men.

Daniel Cochrane, U.S. Navy Veteran - USS Hancock, claimed that when walking through the park in Missoula, there is an overwhelming sense of respect to the individuals remembered. He recently visited Anchor Park in Helena. It is a mess. This bill would help curtail vandalism and help the children and young adults appreciate the lives that have been given for this country's freedoms.

Roy C. Wahl, Montana 163rd Infantry Regiment, reported that the **1st Special Service Force** has a beautiful memorial at Memorial Park in Helena which honors over 400 members who have died in combat. In the same area are the names of 100 who died in World War II, Korea, and Vietnam from all branches of the service. These are our own local people from all branches of the armed forces. In East Helena, there is a display of the names of all servicemen who have served in all branches of service since World War I. Our members are intolerant of those who would destroy or deface these great memorials that honor our dead and to that end we pray that HB 492 will pass.

Robert Perry, Marine Corp League, Disabled American Veterans, Vietnam Veterans of America, and the VFW, stated that every year they have a POW/MIA ceremony at the Special Forces Memorial. Every year he sees new destruction to that memorial. This is of great concern to him because the purpose of this memorial is for us to remember the men who lost their lives.

Mike McCabe, Department of Military Affairs, appeared in favor of this bill because these memorials and cemeteries are the essential and critical symbol of our tie to the past. If we are going to ask our young people to become members of the services and to protect, defend and serve the public, it is important for us to understand that we must preserve the integrity and honor that is symbolized in these memorials. If we allow desecration to occur, we begin to tell our youth that there really isn't any reason to serve in the armed forces, because no one really cares. If the legislature deemed it important enough to protect this Capitol building because of its symbolism, it is equally important to protect those cemeteries, places of worship, and memorials that honor people who went before us and in some cases gave the ultimate sacrifice, their lives.

Opponents' Testimony: None.

{Tape : 1; Side : A; Approx. Time Counter : 9.32}

Questions from Committee Members and Responses:

SEN. GRIMES asked the current penalties and fines for desecration of these memorials. **REP. HARPER** responded that persons involved in these activities can be charged with vandalism and destruction of property. How does one place a value on granite that contains the names of people who have fought and died for this country? This is why a separate statute is warranted.

SEN. GRIMES raised a concern that damage may have occurred and a young person could come along later and become liable for all the previous damage that occurred because that person was in the wrong place at the wrong time. As a youngster, he did a few stupid things and later on in life realized what a mistake that was and how much we owe our Veterans. He questioned how this law would work in Helena in respect to the skateboard park. **REP. HARPER** stated that there isn't much this bill could do for the person who was caught in the wrong place at the wrong time. The benefit of the bill is that it sets out a different category for crimes of desecration of these kinds of places. This is a clear and strong message to our young people that these places are different. They are sacred and should not be damaged.

Closing by Sponsor:

REP. HARPER closed on HB 492. He added that in the House Judiciary Committee the testimony was unanimous. The Mayor of Helena supported this bill. The thoughts and wishes were expressed that this could be the beginning of a new understanding between the skateboarders and the Veterans. We hope to be able to build on this opportunity to begin a new understanding.

{Tape : 1; Side : A; Approx. Time Counter : 9.40}

HEARING ON HB 203

Sponsor: **REP. JIM SHOCKLEY, HD 61, Victor**

Proponents: **Beth Baker, Department of Justice**
Mike McGrath, Lewis and Clark County Attorney - County Attorneys Association

Opponents: **None**

Opening Statement by Sponsor:

REP. JIM SHOCKLEY, HD 61, Victor, explained that the purpose of the bill, before the amendments, was to place all assaults that constituted a felony under the felony assault statute. Under misdemeanor assault, there was one assault called assault of

felony instead of felony assault where a misdemeanor committed by a person 18 years or older upon a person who was 14 years or younger was a felony. This is still a felony and has been moved to the assault statute dealing with felonies.

The sale of dangerous drugs is defined as bartering, giving, selling, etc. The only language change is from selling dangerous drugs to distributing dangerous drugs. Distributing dangerous drugs is then defined as barter, selling, etc. If a person gives his friend a dangerous drug, he hasn't sold the drug. This is similar to federal statute.

Recently the Supreme Court dealt with weapons as used in the statutes. In one instance a minor placed a phony bomb in a school. The amendments provided by the Attorney General's Office will make it clear that even a make believe bomb, if represented as a bomb, is a weapon for purposes of the assault statute.

Felony assault is an assault committed with a weapon. The penalty is ten years. It has become customary to add another 10 years for the use of a weapon. This would add up to 10 years for felony assault and a 10 year enhancement for using a weapon. The Supreme Court held that this was double jeopardy. The proposal is to make felony assault a crime with a 20 year penalty. This is not mandatory but is available to a judge if he deems necessary.

{Tape : 1; Side : B; Approx. Time Counter : 9.43}

Proponents' Testimony:

Beth Baker, Department of Justice, provided amendments, **EXHIBIT(jus55a01).** These amendments address two recent decisions of the Supreme Court. Both amendments deal with the felony assault statute. The first amendment, page 3 - line 15, clarifies that if a person causes reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon, the person will be guilty of felony assault. In the case decided on February 24th, a student of a middle school placed a device, which appeared to be a bomb, under a bathroom sink in the restroom. Five different people saw the device, believed it to be a bomb, and were afraid for their safety. Exercising appropriate caution, the school called in the police bomb squad who removed and destroyed the bomb. At trial, there was no evidence whether the bomb was real or fake. The youth claimed it was fake, but because it had been destroyed no one could tell. Currently the definition of a weapon in Section 45-2-101, requires proof that the article or instrument be

readily capable to being used to produce death or serious bodily injury.

If someone used a fake pistol for a hold up, they could not be convicted of felony assault. This amendment will clear up that problem in the law.

The second amendment increases the penalty for felony assault from 10 to 20 years. This was addressed in the letter from **Judge G. Todd Baugh, Thirteenth Judicial District, EXHIBIT(jus55a02).** In this Supreme Court case the defendant had been charged with felony assault for causing reasonable apprehension of serious bodily injury by use of a weapon. He received a sentence of 10 years under the felony assault statute and an additional 5 year sentence under the weapon enhancement statute which allows an additional sentence of between 2 and 10 years for any person who has been found guilty of an offense and who while engaged in the commission of the offense knowingly used a dangerous weapon. The Court held that because the dangerous weapon was required to be proven as an element of the offense, the weapon enhancement statute could not be applied to that person since this would violate double jeopardy. Since felony assault, under the previous scheme, could have been punished for up to 20 years, this will restore and place this under one statute so the double jeopardy problem will not occur.

Mike McGrath, Lewis and Clark County Attorney - County Attorneys Association, conveyed that when a person is charged with felony assault when they have committed that offense by using a weapon, state law requires the judge to impose an additional sentence from two to ten years under Section 46-18-222. The amendment would allow the court to give a longer sentence when appropriate.

Opponents' Testimony: None

{Tape : 1; Side : B; Approx. Time Counter : 9.50}

Questions from Committee Members and Responses:

SEN. BARTLETT asked why there would continue to be a distinction in the statutory language between felony assault and aggravated assault if the penalties were the same. **Mr. McGrath** responded that he would like to see a revision of the assault statutes to make this clarification. He added that the enhanced penalty provision is a mandatory provision and makes it very difficult to get pleas in certain assault cases. In the instance of a neighbor dispute or a dispute where a person has no violent history whatsoever but a gun is involved and is used, it may not be appropriate for this individual to go to prison. Under the

current enhancement requirements, before the court tossed them out, we were required to send that person to Montana State Prison. Defendants are reluctant to plead guilty if they know it is mandatory that they go to prison.

SEN. BARTLETT asked **REP. SHOCKLEY** if he had any concerns with not retaining a distinction between felony assault and aggravated assault in the statute. She added that this bill may need a fiscal note because it is an increase in the penalty and may have a fiscal impact on the prison population since the penalty is doubled. **REP. SHOCKLEY** believed that it would not increase the burden on the Department of Corrections because the practice has been to use the 10 year enhancement statute. The enhancement is mandatory.

Ms. Baker remarked that in regard to the penalty for aggravated assault, if a change was made it would be necessary to deal with the three-strikes statute because that includes aggravated assault as one of the offenses for three strikes. Felony assault is not one of the offenses. This is one of the most substantive difference between the two types of assault.

SEN. BARTLETT questioned whether aggravated assault was included because it had at least a 20 year penalty or whether it was included due to the nature of the crime. **Ms. Baker** responded that it would be reasonable to assume that it was due to the nature of the crime because aggravated assault requires proof of serious bodily injury whereas felony assault can be just apprehension of injury. **SEN. BARTLETT** added that may be a reason not to eliminate the distinction.

{Tape : 1; Side : B; Approx. Time Counter : 9.58}

Closing by Sponsor:

REP. SHOCKLEY closed on HB 203. He added that the amendments proposed are reasonable. He believes that a felony assault, in certain circumstances, should have a 20-year maximum and the judge should have this discretion. He also believes that something that appears to be a weapon should be treated as a weapon if it puts people in fear.

{Tape : 1; Side : B; Approx. Time Counter : 10.02}

HEARING ON HB 204

Sponsor: **REP. JIM SHOCKLEY, HD 61, Victor**

Proponents: **Thomas Olson, Bozeman District Judge**

Robert Throssell, Montana Magistrates Association

Opponents: **None**

Opening Statement by Sponsor:

REP. JIM SHOCKLEY, HD 61, Victor, introduced HB 204. This bill raises the maximum civil jurisdiction in justice court from $5,000 to $7,000. It requires a person who appeals, to file a timely notice of appeal. It allows the county commissioners of a county to appoint more justices of the peace at their own discretion, if they believe they are needed. It allows courts of this state to put their bail monies in an interest bearing account. An amendment recommended by **Judge Thomas Olson** allows a county, with the concurrence of the courts of limited jurisdiction, to have a specific drug court.

It is difficult to hire an attorney to handle a $5,000 case. The original proposal was $10,000, which was opposed by the justices of the peace and this is a compromise.

If a civil matter is lost in justice court, it is necessary to file a notice of appeal and make an undertaking in certain cases. That undertaking will need to be filed within 10 days.

In Ravalli County, the justice court has a float of approximately $55,000. He imagines that larger counties have much larger accounts. Currently, when bail is posted, it goes to the bank where the bank can use the money and no one receives any interest. There is a Supreme Court case which stated that the executive branch cannot benefit from the bail money. In Montana, the case was that someone had posted $50,000 bail and the clerk of the district court bought a $50,000 CD, earned the interest, and when the individual was found not guilty, returned the $50,000 and kept the interest. If the interest is used to support the court, that is okay. This allows that the bank will need to pay interest to the county and the county will use that money to fund the court.

The proposal of a drug court needs to be with the concurrence of the courts of limited jurisdiction and it is not mandatory.

Proponents' Testimony:

Thomas Olson, Bozeman District Judge, presented an amendment, **EXHIBIT(jus55a03).** This would permit a county to establish a drug court with the consent of all of the judges and would give district judges concurrent jurisdiction in misdemeanor offenses. Drug courts are one of the fastest growing movements across the

country in the court system. It is designed to identify addicts and remove them from the regular court system into a central court whereby the addict is placed under strict rules and controls, has a sentence hanging over his or her head, and is brought before the court on a regular basis, perhaps weekly. By use of computers, the behavior of the addict is tracked. Gallatin County has a federal grant to explore this process. Currently, there is no existing drug court at the district court or justice court level. There are some drug courts in Montana for juveniles. Also, there are some in tribal courts. A central court is needed for both misdemeanor and felony cases.

This is only for the cases where the defendant is pleading guilty and wanting treatment. From the district courts, this may include people who are writing fraudulent prescriptions because they are addicted to prescription drugs. Coming from justice, city or municipal court might be misdemeanor theft cases where a person is stealing to support a habit.

{Tape : 1; Side : B; Approx. Time Counter : 10.10}

Robert Throssell, Montana Magistrates Association, stated that they appreciate the option of exploring the interest bearing trust accounts. The timely filing of notice of an appeal will clear up the court's dockets. The provision to permit commissioners to appoint additional justices of the peace is welcome.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. DOHERTY maintained that if the court gained the interest from bail that was posted, this would place the court in a position of a perceived conflict of interest. The court may have an interest in setting the bail higher in order to generate more funds. **REP. SHOCKLEY** remarked that this was the concern of the U.S. and Montana Supreme Courts. Their concern was that the prosecutor would delay in order to increase the interest. Most of the bail money comes from the justice of peace courts where bail is set at a small amount. The district judges and justices of the peace want to keep the cases moving. The last thing they want to do is postpone cases.

SEN. DOHERTY questioned why the interest would not be returned to the person posting the bond if he or she were found to be not guilty. **REP. SHOCKLEY** understood the argument but believed it would be an accounting nightmare. If this bill passes, the person posting the bail will not be in any worse position now

than he was before the bill. The justice and district courts will be in better shape because they will be getting the interest. The only parties that could argue against this provision in the bill are the banks.

Closing by Sponsor:

REP. SHOCKLEY commented that from the **Magistrate Association's** position, they did demonstrate to him that in certain circumstances this would not be cost effective and may cost money if it was mandatory. In the larger counties, the courts will benefit and the banks will lose.

{Tape : 2; Side : A; Approx. Time Counter : 10.20}

HEARING ON HB 209

Sponsor: **REP. JIM SHOCKLEY, HD 61, Victor**

Proponents: **None**

Opponents: **Mike McGrath, Lewis and Clark County Attorney**
Dennis Paxinos, Yellowstone County Attorney
Marty Lambert, Gallatin County Attorney

Opening Statement by Sponsor:

REP. JIM SHOCKLEY, HD 61, Victor, introduced HB 209 which provides for a nolo contendere plea in a criminal prosecution. This is being done to save money and move the court dockets. Currently the statutes provide for a plea of guilty and not guilty. In the plea of not guilty, there is an Alfred plea. This involves the defendant stating that he or she is not really guilty but since the prosecution can prove it, they will plead guilty anyway. A nolo contendere plea is addressed in Montana Rules of Evidence - 410, **EXHIBIT(jus55a04)**. On page 31, line 19, it is found under the definition of "conviction". It cannot be used against a person in a civil or a criminal matter.

If there is a traffic accident which involves a DUI, there are two suits. There is a misdemeanor of the DUI, running a stop sign, failure to yield, etc., and a civil action which may have a high value. Insurance companies do not want the defendant to plead guilty to a traffic violation because that can be used to prove their case in the civil suit. If the defendant pleads "nolo", he can get out of the criminal system and let the personal injury attorneys and the insurance companies fight over the civil suit. This saves the taxpayers money and doesn't hurt the taxpayers in any way. This cannot be done without the

permission of the judge. The amendment that the county attorneys want to add would be on page 20 and would add that they would have the opportunity of approving the plea. Also on page 22, line 29, they want to reinstate the stricken language that states that a factual basis for the plea must be put in the record. He has no problem with either amendment.

Proponents' Testimony: None

Opponents' Testimony:

Mike McGrath, Lewis and Clark County Attorney, remarked that he is not necessarily an opponent. This bill codifies an existing practice under North Carolina v. Alfred. County attorneys are concerned with language in the bill on pages 20 and 22. On page 20, Section 8 provides that a defendant may, with the consent of the court, plead nolo contendere. They ask that this be amended to add the consent of the prosecutor. On page 22, line 27, they would also ask that the consent of the prosecutor be added. Also, the stricken language on lines 27 and 28, should be reinserted. He added that **REP. SHOCKLEY** has no problem with these amendments.

Typically under these pleas, a defendant will admit that the prosecution has sufficient evidence to convict and that he or she does not wish to go to trial. In effect, they enter a guilty plea saying that they do not wish to go to trial and do not wish to contest the charges but will not admit to the facts as alleged in the information. The prosecutor recites, on the record, the factual basis that would be proven if the case went to trial. The court then accepts the plea and sentences the defendant. If the defendant later wants to withdraw their plea, the factual recitation is important.

The reason for the consent of the prosecutor to be added is that in some cases it is not appropriate to have a nolo contendere plea. The most important of these cases would be sexual offenses involving minors. The goal in sentencing is to require the defendant to go through a effective treatment program. The defendant needs to admit the offense before a treatment requirement can be imposed.

{Tape : 2; Side : A; Approx. Time Counter : 10.30}

Dennis Paxinos, Yellowstone County Attorney, remarked that it is his understanding that this bill is mostly for insurance purposes in civil cases. He urged that a nolo contendere be eliminated

for a sexual offense. The Montana Supreme Court has pronounced three decisions that have dramatically changed how prosecutors need to look at sex offenses, especially against minors. Without an acknowledgment of a guilty plea, the Court has held that you cannot force a defendant into a treatment plan. On another decision, they have held that what is said in a treatment plan cannot be used to revoke the defendant.

Marty Lambert, Gallatin County Attorney, spoke in favor of the amendments. Nolo contendere would be badly abused in sex crime cases. The judge needs to make a factual finding as to guilt. The last question is always having the defendant tell the Court what he or she did to make them plead guilty. He has seen numerous negotiated pleas fail at that point because they do not want to admit to sexual offense. If the defendant will not admit that he or she is a sexual offender, it is difficult to have them accepted into treatment. Also, it is also very cathartic for a victim to hear the defendant admit to the crime.

It is important to have a record of the voluntary plea. The defendant needs to admit and the court make a finding that the prosecutor has facts sufficient to convict that person. This will avoid future litigation.

{Tape : 2; Side : A; Approx. Time Counter : 10.37}

Questions from Committee Members and Responses:

SEN. GRIMES expounded that he is very concerned about allowing sexual offenders another back door. However, he questioned whether there may be a Constitutional problem with allowing a nolo contendere plea in one criminal section of law and not another criminal section of law. **Mr. Lambert** was not aware of any problem of Constitutional import but believed there would be great practical problems with regard to their treatment and the protection of society once they leave the courtroom. Someone needs to have a handle on this person's behavior. Currently, under North Carolina v. Alfred, we allow defendants to plead guilty even though they will not admit to the crime.

SEN. GRIMES commented that if we know that sex offenders would misuse this plea, it would seem that it could be abused for other types of criminal activity. **Mr. Lambert** believed that by amending the bill so that the prosecutor would have to agree with the plea, the prosecutor could make sure that it is not abused to take the easy way out.

SEN. DOHERTY claimed that in the event of a car accident and a potential claim of negligent vehicular homicide or another

similar charge, there would also be a civil case. The individual, the defense lawyer, and the criminal court system have an obvious interest in completing the case. The individual may be willing to plead guilty, pay the fine, and walk away. The insurance company lawyer contacts the defense lawyer and tells him that if the individual pleads guilty, that will be used in the civil case. An incredible amount of pressure is placed on the defense lawyer and the person who caused the accident. They are reminded about the clause in every insurance policy that states if anything is done to affect the outcome of the case, the insurance company will not pay. By allowing a nolo plea, the burden is shifted to the civil court system which may have been able to avoid a lawsuit due to the guilty plea.

REP. SHOCKLEY disagreed. The purpose of the bill is to help the taxpayers and the court systems. In the situation where there is both a civil and a criminal case, without this bill the persons involved in the civil suit can sit back and let the county attorney prove their case for them in state court. The result is that most of their work is done and all they need to do is prove damages. This bill allows the taxpayers, who are funding the county attorney, to get out of the lawsuit and let the insurance companies fight this out in district court.

SEN. BARTLETT questioned the potential problems involved in not allowing a defendant in a sex crime case to plead nolo contendere. In all other criminal charges, the defendant would have a nolo plea. **Mr. Lambert** responded that this depend upon whether this involved procedural aspects or whether it would involve substantive aspects, which would implicate a Constitutional provision for the courts to determine. **Mr. Paxinos** remarked that the legislative body had the right to decide the pleas which could be entered on crimes. Regarding the sex crimes, his concern is that without a guilty plea a person could not be forced into treatment to testify against himself. A suspended sentence could not be revoked if the defendant admitted to new crimes.

Closing by Sponsor:

REP. SHOCKLEY maintained that the purpose of the bill is to help the taxpayers. The federal courts have been using this process for decades. They are not warm and fuzzy with defendants. The judge and the county attorney need to approve a nolo plea. In the instance of a plea of not guilty where the defendant is convicted, he still maintains that he is not guilty. It costs thousands of dollars to convict him but he is no more amenable to sex offender treatment than he was before. A convicted person who pled not guilty is no more amenable to treatment than when he

takes a nolo plea. From a constitutional aspect, there should be no problem because the federal court system has been using this practice for a long time. Montana Rules of Evidence, Rule 410, specifically provides for nolo contendere.

{Tape : 2; Side : B; Approx. Time Counter : 11.00}

OVERVIEW OF CLASSIFICATIONS LEVELS OF 1, 2, AND 3 FOR SEX OFFENDERS

Sandy Heaton, Clinician Director of the Sex Offender Program at Montana State Prison, remarked that she has worked with sex offenders for over 20 years. She is also President of the Montana Sex Offender Treatment Association.

The risk assessment used in Montana is through the Department of Justice. One of the dilemmas with risk assessment is that all of the factors used are static factors and do not take into account changes that an offender can go through. If a tier 3 offender completes treatment, he could go down to a moderate risk. Some of the criteria used for risk assessment include the type of crime, how much violence was involved in the crime, the age of the offender, the age of the victim, the gender of the victim, whether the offender has taken responsibility for the crime, other crimes involved, whether or not there is a chemical or substance abuse problem, the supervision he will be under following release, etc. Current research shows that when these persons are supervised very closely and have a support system, they do better and the risk to the community lessens, even for high risk offenders.

The criteria is reviewed and totaled which gives the offender a score. At the time of sentencing, this assessment is used in conjunction with a complete evaluation on the offender. The practitioner recommends a risk level and gives the rationale for it. This is all given to the judge to help in his determination of risk level. Inmates who do not participate in treatment end up being a higher risk when they go out into the community and it behooves society to know about where he lives and what is going on in his life. Also, it is important to try to get him into treatment if he is willing to attend.

Research is clear that when stress is increased on an offender, his likelihood of reoffending may increase. On the other hand, the more they are watched, the less they are likely to reoffend. This is a balancing act. The offender needs to know he's watched by people who not only have the job of protecting society but are also in support of him. Many offenders are not opposed to supervision and understand that it is important that they have someone to go to so they do not get into trouble by reoffending.

CHAIRMAN GROSFIELD asked whether the analysis of the offender took place before sentencing or after the person was in prison. **Ms. Heaton** explained that the new laws provide that people come into this system before sentencing. They perform a suggested risk assessment when people leave the prison because they were sent to prison before the new law took effect.

CHAIRMAN GROSFIELD questioned what information the judge would have when he made the first determination of level. **Ms. Heaton** explained that he would have the risk assessment recommendation plus whatever else the evaluation shows. It may include that the person should be incarcerated because he may be too high of a risk to do treatment in the community, chemical dependency treatment may be needed, he should not be around minor children, etc.

CHAIRMAN GROSFIELD inquired how soon after incarceration a sex offender could petition to be assigned a lower level. **Ms. Heaton** explained that they do not specifically receive this type of request. A person can start to be programmed for treatment as soon as they arrive at the institution. Once treatment has been completed within the institution and they are getting ready to leave, they take another look at the person to see if the suggested tier designation is different. Oftentimes it is. Some crimes are so bad that their risk would not be reduced even if they did very well in treatment. For example, in one case a man raped an adult female and killed her. Once a person has killed someone, it is hard to say that they are not high risk.

CHAIRMAN GROSFIELD questioned whether a level two offender who refused treatment would have his level changed when he left the prison. **Ms. Heaton** responded that it would depend on the crime. If that person has finished their prison time but has suspended time, depending on the wording of the suspended sentence, in some cases those persons are revoked and sent back to prison. This seems to be appropriate if they choose not to do treatment.

CHAIRMAN GROSFIELD remarked that HB 76 comes close to making a level two offender and a level three offender comparable. He questioned whether the passage of this bill might affect their incentive to do treatment. **Ms. Heaton** clarified that one of the big differences between a level two offender and a level three offender is that a level three offender needs to report his address every 90 days while a level two offender does not need to do so. Having the exact address is not a big deal. In the real world, the probation and parole officer and others working with the offender know his exact address anyway. Knowing that they are being watched makes them more accountable and less likely to reoffend.

SEN. DOHERTY questioned whether giving the exact address out for the level two offenders might provide a disincentive for people to seek treatment. **Ms. Heaton** remarked that reducing their level is usually not the primary motivation for seeking treatment. The primary motivation for doing treatment for most offenders in the prison is to get parole and be able to leave the prison. If they are in the community, they do treatment so they do not go to prison. The sex offender tries to hang on to whatever level of freedom they have. People do not embrace these offenders and think they are wonderful people. However, in Montana people in a community will work with a probation and parole officer as well as the treatment providers. This holds the offender accountable without being detrimental to him. Montana has a network in place that is on the cutting edge. This network includes treatment providers, probation and parole officers, county attorneys, etc. This is a benefit to both the offender and the community.

SEN. HALLIGAN raised the issue that when the exact address is given out, the entire family of the offender is targeted. **Ms. Heaton** affirmed that this is a big concern and it is not fair. The average age for most of the offenders is thirty plus years old. Within the prison, they work with them not to go back to their parent's home. They need to be responsible by living on their own.

SEN. HALLIGAN questioned whether the treatment regiment included the discussion that the pressure on them may be more severe if they do go back into the family unit. The rest of the family is then targeted. **Ms. Heaton** explained that it is discussed at length. One of the things they stress is how one's behavior can harm other people. They discuss this in relation to their family, their bosses, and other people in the community. They also want them to be responsible and not to live off their families.

SEN. HALLIGAN questioned how the rest of the prisoners treated the sex offenders. **Ms. Heaton** responded that sex offenders are the bottom of the pecking order. They have seen that they are starting to have fewer problems and are not hassled as much if they are in treatment.

CHAIRMAN GROSFIELD remarked that several years ago the sense was that sexual offender treatment was not very effective. **Ms. Heaton** explained that current research is showing that the way to make sure that treatment continues to be effective is with this level of supervision. Another level of accountability has been added that seems to be working very well. The sex offender needs to be willing to work on their problems because there is no cure.

The research is showing that high risk offenders especially have a lower risk of reoffending with supervision.

SEN. BARTLETT asked for clarification of some of the requirements in a treatment program in the community for a sex offender. **Ms. Heaton** explained that the structure of the treatment program is the same in the community as it is in the prison. Because they are in the community, a lot of monitoring is needed. They are under very close supervision with their probation and parole officer. They have polygraph examinations on a regular basis. They meet for group therapy once a week. Most programs also place them in family counseling. Many of the programs have a non-offending spouse's group partially to deal with their issues and partially to learn and understand sex offenders so they can be part of the support system that helps monitor the offender. The children are often in counseling. Usually the treatment provider and the probation officer are in frequent contact. Jobs become an issue. A child molester cannot hold a job anywhere near children. Many programs will not let them have access to the Internet due to the pornography that is available.

SEN. GRIMES asked if all risk levels were allowed to be in treatment in the community. **Ms. Heaton** affirmed that there were all risk levels in community programs and all three risk levels at Montana State Prison. The prison has a higher percentage of the higher risk offenders.

SEN. DOHERTY and **SEN. BISHOP** were excused from the meeting.

EXECUTIVE ACTION ON HB 492

SEN. BARTLETT suggested reducing the penalty to five years.

CHAIRMAN GROSFIELD remarked that the penalties for criminal mischief are close to the penalties in this bill.

SEN. HALLIGAN suggested that the skateboarders and the veterans could both benefit from sharing the area.

Motion/Vote: **SEN. HALLIGAN** moved that **HB 492 BE CONCURRED IN. Motion carried unanimously - 7-0.**

EXECUTIVE ACTION ON HB 371

Motion/Vote: **SEN. HALLIGAN** moved that **HB 371 BE CONCURRED IN. Motion carried unanimously - 7-0.**

ADJOURNMENT

Adjournment: 11:38 A.M.

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SEN. LORENTS GROSFIELD, Chairman

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JUDY KEINTZ, Secretary

LG/JK

EXHIBIT(jus55aad)